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No. 74

IN

The Supreme Court

of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CONSOLIDATED FREIGHTWAYS, INC., AND OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC.,

Appellants

vs.

PIERCE AUTO FREIGHT LINES, INC., LOS ANGELES-SEATTLE MOTOR EXPRESS, ANGELO COLLETTI, DOING BUSINESS AS COLLETTI FAST FREIGHT, PACIFIC MOTOR TRUCKING COMPANY AND PACIFIC SOUTHWEST RAILROAD ASSOCIATION.

On Appeal from the District Court of the United States for the District of Oregon

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REPLY BRIEF
for
CONSOLIDATED FREIGHTWAYS, INC.,
and
OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC.

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Come now Consolidated Freightways, Inc., and Oregon-Nevada-California Fast Freight, Inc., intervener appellants in the above-captioned case, and respectfully submit the

following reply to the brief of appellees, Pierce Auto Freight Lines, Inc., et al, filed herein under date of January 14, 1946.

GENERAL STATEMENT

Appellees' answering argument is classified under seven general headings, which we will treat herein seriatim. Preliminarly, however, we wish to point out that the great majority of appellees' statements and representations are not supported by reference to the record, as the rules of this Court require. Some of them we can tell at a glance have no foundation whatsoever in the record.

An astonishing example of an off-record excursion is the reference to and quotations from the examiner's report in each case. (Beginning last paragraph page 5, appellees' brief, and ending first paragraph page 8.) It was our understanding, when we wrote our opening brief, that the rules prohibited making use of those examiners' reports because appellees had failed to introduce them in the court below.

Now, by their use of quotations from each of those reports they show this Court that they consider them relevant to the issue here and a pertinent part of the record before the Commission. With this conclusion we agree. As we stated in our opening brief, Mr. Ellis told the court below "we intend to offer in evidence the entire record before the

Commission" . . . "I have, I believe, the complete record in both cases." ". . ., with the exception of two or three exhibits which were not furnished to the parties and which I have requested promptly from the Secretary of the Commission, but which I have not yet received." (R. 102-3.) It was not discovered by these appellants until they assembled the record for submission to this Court that the trial examiner's report in these two cases and Consolidated's exceptions to the report in its case had not been offered nor later supplied.

Does not this admission of appellees that they regard those original reports as material and relevant in this case carry with it a confession that the District Court was deprived of evidence which was essential to a full grasp of the issues? If so, it would seem to necessarily follow that the decision below must fall. "The Court endeavors to protect the rights of parties to fair hearings, but it will not presume that their rights have been substantially denied when they do not embrace the opportunity to prove their grievance in the court below." (*Chi. St. P. & M. & O. Ry. Co. v. U. S.*, 322 U. S. 1-3.)

The shortage of record references in appellees' brief tends to burden these appellants in the preparation of this hasty reply. Most of their references lead only to the Division 5 report which they seek to overthrow and, when the factual statements are measured against the record refer-

ences used, it develops that the record falls short of covering them.

For instance, at the bottom of page 10 and the top of page 11 of appellees' brief, they say:

> "It is a significant historical fact that at the time the applications of Consolidated and O.N.C. were filed and until after the conclusion of the hearings thereon, seven pioneer carriers were conducting operations between Portland and San Francisco. (18)"

Yet, when we turn to page 18 of the record, we find nothing to show that the carriers described in the Commission's report were "pioneer" carriers. In our opening brief we stated that the joint Consolidated-O.N.C. service was the pioneer motor carrier service between San Francisco and Portland. That service dated back to 1929 (R. 170, 1540). That was six years before the "grandfather" date prescribed in the Act (49 U.S.C.A., Sec. 306(a), first proviso).

Actually the Division 5 report, at page 18 et seq., affirmatively shows the denial of "grandfather" rights to Los Angeles-Seattle Motor Express, Colletti Fast Freight, O. J. Mitchell, and Pete Lubetich. Of Pierce Auto Freight, the Division said: "In 1935 a daily service was instituted between Portland and San Francisco . . ." (R. 21.) They must have been started after the grandfather date for it is clear from the evidence introduced by appellees regarding the

Pierce Docket No. MC-17593, Sub. 1, that it was a public convenience and necessity case to extend from Medford to San Francisco (R. 2451). The Division's report says further of the Pierce operation:

> "Its services south of Medford were discontinued for approximately one year beginning March, 1938. In 1939 it again commenced operations south of Medford, rendering a weekly service between Medford and San Francisco. Since shortly prior to the hearing herein, Pierce has rendered a daily service between Portland and San Francisco." (R. 22.)

Apparently also the Pacific Truck Express rights into San Francisco required proof of convenience and necessity and, therefore, were not grandfather rights (R. 2446-2448). After noting that Lubetich and Mitchell were denied grandfather rights, the Division said: "There is nothing of record to show the details of the service rendered by either Lubetich or Mitchell." (R. 23.)

Thus the record shows that not one of the appellee carriers can lay claim to having been a "pioneer" in the Portland-San Francisco field. The record reference used by them to support the statement actually shows the opposite.

At the bottom of page 13 of their brief, appellees refer to *McCracken et al v. U. S.* and imply that the right of Pierce Auto Freight Lines, Inc., to serve between Portland and San Francisco had been the subject of a court attack. An examination of the case (47 Fed. Supp. 444) shows that it

involved only the grant of "grandfather" rights to serve certain intermediate points between Portland and Medford.

Before launching into their treatment of their first point, appellees neatly shrug off the obligation to use record references as follows:

> "We shall attempt to demonstrate the fatal commingling of the record from a consideration of the order itself *with a minimum of references to the record* in the respective proceedings, it being obvious that any attempt to demonstrate by record references the instances where evidence in only one record was made applicable to both would place an intolerable burden upon both Court and counsel." (Page 26 of Appellees' Brief, our emphasis.)

For our part, we understand Rule 27, subsection 3, of the Rules of the Supreme Court, to call for specific record references in support of every representation concerning the evidence and, while we agree that in a record this size that becomes a real task, the thought that we could so easily relieve ourselves of it had never occurred to us.

REPLY TO APPELLEES' ARGUMENT I

The Court's finding No. X is quoted by appellees at page 25 of their brief as follows:

> "In each proceeding embraced within the report and the Commission's order, evidence not offered or received in such proceeding and not a part of the record

therein was drawn upon and considered by the Commission."

This finding, which was prepared by counsel for appellees (R. 72) is, as we have shown, highly inconsistent with the language of the lower court's opinion which says, in so many words, that it isn't necessarily so. The language of the opinion to which we refer is this:

> "It is said by plaintiffs that the Commission took evidence out of the case upon one application and gave consideration thereto in the case upon the opposite application. Examination of the joint report and the records shows that the evidence commented upon as relating to Consolidated can be from the record in that case. The same observation is pertinent with regard to O.N.C. and the record in that case. Some general matters are referred to which might be pertinent to both records, but these are matters of ordinary observation. The situation of each of the plaintiffs was carefully considered in relation to the particular records in which each was concerned." (R. 68-69.)

What we wish to stress here is that appellees have really shifted their position. Instead of saying unequivocally "there is no evidence in O.N.C.'s record bearing upon this particular finding in the Division report concerning O.N.C.'s case" or "this particular portion of the Commission's report relating to Consolidated's case is not supported by any evidence in Consolidated's record," they say something else. The complaint now is "these facts are undis-

puted as stated, but are taken indiscriminately from both records without reference to either."

Being unable to back up the charge that the Commission, in granting one application, considered evidence not properly a part of that applicant's record, they have retreated to a second line. Their whole discussion now boils down to a protest that the Commission's report fails to show which record or records were relied upon in support of every statement made therein. They are complaining only that the report is not so definite that one can always tell to which record reference is made. This is a complete change of position. They charged a defect in *substance* which we conceded in argument would be serious, if established (R. 145). Now they are complaining only of a defect in *form.*

On this point it is of interest to note the same District Court's language in the *McCracken case* cited by appellees. (47 F. Supp. 444, 446.)

> "The Commission controls the adjective regulations of proceedings before it, and there is no doubt that the matter was fully and clearly presented. Courts in reviewing proceedings should look through form to substance. If a matter has been fairly heard, especially before an administrative body, no order or finding should be overturned because of formal defect."

The second paragraph of page 27, captioned "Similarity and Differences Between Applications", is free from any record reference. We cannot tell why appellees characterize

the service innovations proposed by Consolidated as "apparently radical." They are very well set forth in Appendix C of the Division 5 report, which is reprinted at pages 43 and 44 of this record. The average speed of those schedules was considered by Division 5 under the heading "Service Proposed" and the findings made that the proposed Seattle, Spokane and Portland schedules would average 26, 26 and 28 miles per hour respectively. There is nothing radical about that. Such schedules were then being operated without difficulty by O.N.C. between San Francisco and Portland (R. 1389).

The following passage from page 29 of appellees' brief surely goes beyond any license that can reasonably be claimed by counsel:

> "Both interveners were so *unsure* of their position in this proceeding that they sought to accomplish the same result by purchasing or controlling connecting carriers (and did accomplish the result before the attacked order was issued) (13-14), although the Commission at that time refused to sanction either effort."

There is nothing on the record pages cited to indicate that the interveners were unsure of their position and there is no suggestion as to what difference it makes whether an applicant before the Commission is unsure or "cocky." The statement that the applicants did accomplish their objectives by purchasing or controlling connecting carriers before the Division 5 report was issued is both *off-record* and *untrue*.

Why it is inserted as part of appellees' argument on "commingling" is beyond us. Even if the statement were on record and true (and we emphatically repeat that it is neither), it would have no tendency to support the argument in which it is found. It must be intended, therefore, to serve some other purpose.

After complaining that the language of the report rests upon "both records without reference to either", appellees proceed to quote fragments and bombard the Court with questions such as: "In which record?" "With regard to what time saving?" "And between what points?" "Which shippers?" "Testifying in support of what proposed service?" If these appellees had seen fit to offer the complete record before the Commission, as they undertook to do, we would have here the examiner's original report in each case and we feel certain that appellees would have no difficulty answering their own questions. We do not think they should have any trouble finding the supporting evidence in the record now before this Court.

We can readily answer those questions and stand ready to tell the Court from which record every statement in the quoted sections was taken. It should be kept in mind that all of the testimony and exhibits introduced by the protestants is in *both* records. All of the testimony given by the president of O.N.C. is in *both* records and four shipper witnesses testified for *both* (R. 2336, 2369, 2335, 2358).

On the subject of "commingling" appellees lead off with, and seem to rest heavily upon, this fragment (p. 29 of appellees' brief):

> "'*For reasons which are obvious, authority should be either granted or denied by both applicants to operate over the Valley Route.*' (Emphasis added) (R. 39)."

While this comment is probably dictum, inasmuch as it was not used as any basis for the Division's final conclusions, it represents flawless law, equity and logic. It should be read with the sentence which immediately precedes it:

> "As seen, Consolidated and O.N.C. transport the bulk of the traffic between San Francisco and Portland." (R. 39.)

It is good law to say that both applications must be decided the same because the evidence in each case was practically the same. The joint service which employed the combined facilities of both represented the bulk of the available through service. Both applicants pointed mainly to its defects. The Commission had adjudicated that it was inadequate, not because it could not handle all freight offered, but because of the inherent defects of a joint service (R. 2526). The shipper witnesses in each case complained of its defects and expressed need for better service. Each applicant proposed to remedy the defects in the same way. If the Commission had reached opposite conclusions in

identical cases that surely would have been caprice of the rankest kind.

That the remark stressed by appellees is sound in equity and logic is readily apparent. These two pioneer carriers had devoted their combined facilities to the one through service and, over a period of more than eleven years, had jointly developed a volume of business which represented the bulk of the total traffic moving by truck between San Francisco and Portland. (R. 39.) They had unsuccessfully contended before the Commission in opposition to the extension applications of Pierce Auto Freight Lines, Los Angeles-Seattle Motor Express and Pacific Truck Express that their joint service was adequate and satisfactory to meet the public's needs and convenience (R. 2451, 2448, 2446, 2526, 1463, 1465-6). The Commission found that it was inadequate because inferior to a single-line service.

They could see the handwriting on the wall. They had better set about to save their business. It was no good to blind themselves to what was happening and to tell themselves "we still think our joint-line service is good enough for the public, despite the several final Commission findings to the contrary." What was the logical, equitable and intelligent thing for them to do?

Obviously it was to give the public the type of service which the Commission said it needed. How could that be done? Possibly by a plan such as Freightways as Mr. James

suggested, but that was not agreeable to O.N.C. (R. 176). Mr. James testified on this point as follows:

> "Freightways could not immediately overcome many of the handicaps in the joint service. This probably was apparent to Mr. Gritsch, and we cannot say that his judgment in deciding not to come into Freightways was not the best. There is no doubt that the granting of both of our own and O.N.C.F.F. applications will result in a much better service to the public than could be rendered under any plan which Freightways would have been able to devise." (R. 1926.)

How else could the public be given the improvement needed? Only by the plan followed. Messrs. James and Gritsch reasoned that each line could take the equipment devoted to carrying all of the through business half way and haul half of it all the way (R. 844). The cost of re-handling at Medford would be eliminated (R. 855, 856, 874-875). The delay would be eliminated (R. 835, 841-842-843, 859, 869, 871-872). The business would be more profitable (R. 874-875). The vehicles could be better utilized because they would not have to stand idle at Medford for the hours necessary to make the transfer (R. 841, 848-849, 869, 871-872).

So, in the exercise of sound managerial discretion these two applications were filed. Together they represent a proposal to split the one double-capacity through service lengthwise and create two single-capacity, single-line

through services. It seems very obvious to us, as it did to the Commission, that both applications should be treated the same. To grant one and deny the other would be to overburden one with the traffic which had required the combined equipment of both and to cut the other off from the through business which it had spent so many years developing. What could be more obvious than this?

At page 30, et seq., of their brief, appellees deal with the "proposed speed-up of service" and start out with the complaint that the Commission improperly extended the benefit of doubt to these appellants on the question whether or not the proposals could be attained. That was one of the counts of their complaint below (R. 7) but it was not sustained and it is not on appeal here.

At the bottom of page 31, appellees quote a portion of the Division's report saying "briefly, the proposal is to save as much as 24 hours in service between San Francisco and certain points." Then they ask this Court: "To which record does this refer? To what points was a 24-hour faster service proposed? Certainly not by both applicants." Here they are in error again. Appendix C to the Division's report appears at pages 43 and 44 of the record before this Court. It shows numerous typical points to which Consolidated's proposal held out 24-hour faster service. And in the body of the report, Consolidated's proposal is treated as follows:

"The proposed service will enable Consolidated

to render as much as 24 hours faster service to 246 points, typical of which are Wallace, Idaho, Missoula, Mont., Yakima, and Lakeview. * * * Roseburg, Eugene, and 66 other points will receive half a day faster service. Points in California intermediate between San Francisco and the Oregon-California State line will receive faster service on southbound traffic. One hundred and seventy points will receive 24 hours faster service than is now available by any means of freight transportation.

"Appendix C attached hereto is illustrative of the present and proposed delivery service of Consolidated, and the present delivery services of protestants, on traffic from San Francisco Bay points. The territory in the northwest to be benefited by a 24 hours faster service has a population of 1,374,254. The California territory that will also be benefited by a faster service has a population of 1,850,715. This does not include points south of San Francisco Bay area which will receive a faster service through connections at San Francisco." (R. 15-16.)

Immediately following the above passage, the Division report deals with the O.N.C. proposal to expedite service all the way through to Seattle, Spokane, etc. (R. 16.) It is true, as appellees state, that O.N.C. was opefating between San Francisco and Portland through an arrangement with Seaboard in 26 to 30 hours. The Division said, however:

"The present arrangement with Seaboard will not give the service proposed because Seaboard cannot

serve the intermediate points from Grants Pass to Portland nor can it serve the Coast territory." (R. 17.)

Throughout their brief, appellees have selected fragments from the Division's report which, standing alone, do not correctly portray the consideration which the Division gave to the two cases.

They say of O.N.C. "It proposed to serve points beyond Portland by interchange involving as much delay as now experienced (16)." Page 16 of the record shows, however, a proposal on their part to interchange trailers with connecting carriers, "thus giving through service all the way from San Francisco to Seattle and Spokane." L. V. Smart of Smart's Auto Freight testified "that this would enable his company to make 24 hours faster time on shipments between San Francisco and Seattle. The same would apply to shipments between San Francisco and Astoria." (R. 234-5.) Mr. Dawson, traffic manager of Forney & Sons operating between Portland and Yakima Valley points, said that this proposal would make possible second-morning deliveries into Yakima "which is 24 hours better than anyone operating at the present time." (R. 257.) Similar testimony is in the record on O.N.C.'s proposed service between San Francisco and Spokane (R. 474 to 478) and The Dalles (R. 528).

Next on page 32, appellees quote the section of the order observing that numerous public witnesses expressed need

for such time savings and some of them stated that it would increase their business. Then they ask the Court: "In which record? With regard to what time saving? And between what points?" We can very easily show the Court that there is abundant testimony in each record to support the Commission's observation. For instance, in the Consolidated record we can refer offhand to Mr. Heydenburk of Grants Pass (R. 1591-2), Chase of Eugene (R. 1631, 1633), Hoffman and Banning of Portland (R. 1607 and 1641), Jory of Salem (R. 1661), Halford of Pendleton (R. 1670, 1671), Basche of Baker (R. 1710), Compton and Williamson of Seattle (R. 1736, 1741 and 1744). They all testified to the need for faster service to or from San Francisco. In the O.N.C. record we can pick out offhand Shook of Roseburg (R. 312), Braden of Grants Pass (R. 323), Hill of Vancouver (R. 333), Brannon of San Francisco (whose testimony is also in the Consolidated record) (R. 746). All of these and many others indicated that their businesses would be benefited by the improvements proposed by the applicant on whose behalf they were testifying.

We can answer the rest of appellees' questions as easily as we have the foregoing, but the limited time within which we must have this brief printed precludes our doing so here. We will stand ready at oral argument to show good evidence in each record to support the Division's remarks which apply to each.

We believe that appellees misstate themselves when they say, at page 36 of their brief, that no effort was made by the Commission to indicate the intermediate points to which service was proposed by each applicant or is not now being rendered. Appendix A of the order (R. 42) shows the authority sought by Consolidated and Appendix B (R. 43) shows the same for O.N.C. It is therefore not correct to say, as appellees have, that the Commission did not indicate to which intermediate points service was proposed by each. We think it is equally untrue to say, as they have, that the Commission did not show to which intermediate points service is not now being rendered. We refer the Court to the discussion in the report under the heading "Intermediate points" on page 30 of the record:

> "*Intermediate points.* As seen, the authority held by most protestants to serve intermediate points is restricted. Some of the witnesses complain of the lack of service rendered by protestants to intermediate points. Even as to Pierce, which holds the right to serve all intermediate points on its routes, some of the witnesses were not familiar with the fact that this protestant was offering a daily service. In this connection, however, it should be noted that Pierce increased its service to San Francisco from a weekly to a daily one shortly prior to these hearings.
>
> "In August, 1940, L. A. S. had no traffic to or from Grants Pass, Oreg., or any other point in Oregon south of Eugene. During that month it grossed over $33,200, of which $30.01 represented hauls between San Francisco and Eugene, and $30.89 between San Francisco

and Salem. L.A.S. is listed in the telephone directory of Seattle, Tacoma, Portland, San Francisco, and Los Angeles but not at any other Oregon or California points on the routes involved. Colletti is listed in the telephone directory of Seattle, Portland, Oakland, and Los Angeles. Less than 1 percent of Cascade's traffic moves between San Francisco and points in Oregon south of Portland. This carrier has no telephone listings at any intermediate point between San Francisco and Portland."

REPLY TO APPELLEES' ARGUMENT II

Under this heading appellees seek to defend the theory created by the District Court which was the subject of our arguments numbered 1 and 2, pages 35 to 49 of our opening brief. On the merits of the theory we have little to add. As we have shown, appellees did not claim any such surprise when they were before the Commission and they did not plead or argue it below. We have also shown conclusively that the appellees, their counsel and witnesses on both sides of both cases did, in fact, foresee and assume that both applications might be granted.

The lower court did not really find, in connection with this theory, that the plaintiffs there were actually prejudiced. It merely assumed that they might have been. Appellees, in their brief to this Court, do not suggest how they were prejudiced.

On page 44 of their brief, appellees are off-record again

in referring to the briefs filed before the Commission. They say that there was no argument in any of the briefs indicating a contention that both applications should be granted. With this off-record comment we again disagree and state unequivocally that it is contrary to fact.

We ask the Court to notice that there is not one record reference on page 45 of appellees' brief. They say that the "applications filed allege no public need for the institution of two added through-line competitive operations and no hearing was had on the issue." The applications in these two cases are as important a part of the record before the Commission as is the complaint in a court case, yet appellees did not introduce them in evidence below. If appellees consider them sufficiently important to the issues herein to justify a departure from the record to refer to them, are they not again admitting that they withheld from the District Court a material part of the record before the Commission?

What justification can appellees have to state, without any reference to the record, "each applicant urged a superior right to the favor of the Commission, as opposed to the other applicant, and endeavored to prove, not that there was room or need for two added through carriers nor that there was need for any added service, but merely that a single through-line service was preferable to its own joint-line service in connection with the other applicant." Their

whole statement is exactly contrary to fact. Neither applicant urged a superior right. Neither opposed the other's application (R. 10). Both proved, in addition to the defects of the joint-line service, substantial increases of traffic, shipper dissatisfaction with that joint-line service and the services given by the protestants, etc. (R. 31).

It seems that appellees, in their enthusiasm for this new theory which the District Court originated, have completely blinded themselves to the evidence in the cases. Often they seem to deliberately ignore everything in the report which fails to square with their theory. For instance, they say (1st paragraph, page 57) that there is no finding that either proposed service will actually serve a useful purpose. Then they follow that by saying "Next, there is no finding whatever whether or not this useful purpose, if any there be, will be served as well by existing carriers." We have already quoted from the discussion dealing with the proposals of both Consolidated and O.N.C. to improve existing service by 24 hours. The Division said of Consolidated proposals "170 points will receive 24 hours faster service than is now available by any means of freight transportation." Exhibit C compares Consolidated's proposals with all other services including those of appellees (R. 43-44).

There was a finding that "none of the protestants proposes a like service", (R. 29) and, "numerous public witnesses expressed a need for a service that would be time-

saving. Some of them asserted that it would increase their business." (R. 29.) How, in the face of these findings, can appellees say that there was no finding either that the proposed service would actually serve a useful purpose and no finding whether or not that useful purpose would be served as well by existing carriers?

In the same paragraph on page 57 of their brief, they state unequivocally "but the Commission does not even suggest the Pierce line is in any respect unable to fully meet the public needs for this through service." The operations of all of the protestants were described in unusual detail in the report (R. 18 to 27). We ask the court to note that the order recites that the O.N.C.-Consolidated joint through service, at the time of hearing, was handling the bulk of the traffic moving between San Francisco and Portland. (R. 39.) It also shows that, at the time of hearing, the two carriers were interchanging at Medford northbound tonnage of approximately 110,000 lbs. daily. (R. 31.) The Division said of the Pierce service (R. 22):

> "In 1939 it again commenced operation south of Medford, rendering a weekly service between Medford and San Francisco. Since shortly prior to the hearings herein Pierce has rendered a daily service between Portland and San Francisco.
>
> Due to the resumption of a daily service, Pierce has built up a small tonnage. During July, 1940, the volume of freight out of San Francisco amounted to 7 or 8 tons per day, which included 3 or 4 tons that it

received from connecting carriers. It maintains several local schedules between Portland and Medford. Departures from Medford north are regulated to give second-afternoon service in Grants Pass from San Francisco. It does not handle a sufficient amount of tonnage to justify the operation of a through unit between Portland and San Francisco without stops.

Pierce owns one trailer equipped with mechanical refrigeration which is available for use between Portland and San Francisco when commodities require it."

How in the face of that discussion can appellees bring themselves to tell this Court that the Commission "does not even suggest that the Pierce Line is in any respect unable to fully meet the public need for this through service."

Appellees have seized upon an isolated sentence "for reasons which are obvious, authority should be either granted or denied to both applicants . . ." and hold it up as indicative of a vicious purpose on the part of the Commission to decide the case regardless of the evidence. We think that the observation, as already shown, represents good law, good equity and logic when applied to the discussion as a whole. But a report of this sort can not and should not be characterized otherwise than by reading it in its entirety.

In *United States vs. Louisiana*, 290 U.S. 70, decided November 6, 1933, an order of the I.C.C. requiring carriers to charge in intrastate commerce in Louisiana "rates which shall not be lower than the rates now in force and applicable

to the intrastate transportation within the State of Louisiana, plus the surcharge authorized by the finding in the Fifteen Per Cent Case," had been set aside by a three-judge court upon the grounds that the Commission's findings were inadequate. Mr. Justice Stone said: (p. 80)

> "The objection that the finding of unjust discrimination between intrastate rates against interstate commerce is unsupported by any finding that the increased rates would produce increased revenue is raised upon the statement, separated from its context in the Commission's report, *'we conclude that no possible finding in regard to the revenue outcome of the increases can be justified.'* It is manifest that any finding of undue prejudice to interstate commerce, based upon the failure of prevailing intrastate rates to contribute their fair share to the support of a national transportation system, must necessarily rest upon a prediction that an increase of the intrastate rates will result in an increase in revenue, a prediction involving, especially since 1930, many elements of uncertainty. There are no formal requirements for the findings to be made by the Commission in this type of case, see Manufacturers Ry. Co. v. U. S., 246 U. S. 457, 490, and while the particular form in which they were cast here is not to be commended, the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon the supporting data, including estimates of experienced railroad traffic men, to which the report refers, that the probability of increased revenue was sufficiently great to make the increase of rates a reasonable exercise of sound managerial judgment. This, we think, meets the requirements of the statute." (Emphasis added.)

In that case the sentence which we have emphasized is actually at odds with the result reached by the Commission while in ours the observation that both cases should stand or fall together is entirely consistent. It seems very clear that the Division 5 report when read as a whole sufficiently expresses the conclusion of the Commission, based upon supporting data and evidence, including estimates of experienced auto freight men, to which the report refers, that the granting of both applications would represent a convenience to the public and would meet a demonstrated public need without injuring or impairing the operations of any one.

In the limited time available to us now, we cannot take the court through appellees' entire brief page by page. Pages 47 to 50 inclusive are practically devoid of any record reference and those that are used do not squarely cover the assertions made. Moreover the tendency is to pick out small fragments of the factual evidence before the Commission in an effort to convince this court that the judgment of the Commission was faulty.

If anything can be said to be well settled it is that our courts will not substitute their judgment for that of the Commission on issues of fact. What good does it do for instance to argue as appellees have at the top of page 47, that, upon the impossible hypothesis that one carrier would take all of the northbound and the other all of the south-

bound, O.N.C.'s president admitted that his line would be in a hopeless position? What is the object of arguing that Consolidated's president admitted that he had not made an investigation to determine what truck lines were operating over the routes involved, and considered such an investigation unnecessary? The record reference used to support this statement does not lead us to any testimony of Mr. James, nor any such admission by anyone else. What Mr. James said was this:

> "The question was, whether or not we made an investigation. The answer is that no investigation was necessary, but in the common conduct of your business you know what lines are operating. You know in a practical way what they are doing. . . ." (R. 1565-6.)

They urge in their brief (second paragraph, page 49) that because the testimony of only 4 O.N.C.'s witnesses was introduced in the Consolidated record, "The conclusion is inescapable that it was the considered judgment of counsel for Consolidated, that the testimony of the other 56 shipper witnesses testifying on behalf of O.N.C., contains nothing which would support the Consolidated application." Such reasoning assumes contrary to fact that counsel for Consolidated was present when all of the other witnesses for O.N.C. testified, or at least knew who were going to testify for O.N.C. The four witnesses referred to, were already committed to appear on behalf of Consolidated. Permission to incorporate their testimony in the Consolidated record

was given merely to save them the trouble of coming back to the hearing again (R. 2336). (Incidentally appellees are in error in indicating that the witness Toye was one of the four.)

Appellees next say "the highly significant fact is that none of the witnesses in either case expressed the slightest need for two added through services." This again overlooks, not only the 4 witnesses just mentioned who actually testified for both services, but also the other witnesses listed on page 48 of our opening brief (which presentation did not purport to be complete).

REPLY TO APPELLEES' ARGUMENT III

The District Court concluded (without any corresponding finding) that "the failure of the Commission to consider the public interest as opposed to the convenience and necessity of Consolidated and O.N.C. is a material jursidicial defect." This was another new theory which was originated for appellees by the District Court. They had not tried any such issue before the Commission and they neither pleaded nor argued such a point below.

If, after the elaborate findings made with respect to the improvements of service and the public's expression of need therefor, the public's need for the mechanically refrigerated service which each applicant proposed and the inability of appellees to meet that demand, the public need

for the service to intermediate points and the neglect of those points by appellees, etc., there is any room whatsoever for a conclusion that the Commission catered to private interests and ignored its duty to consider the public interest, it lurks in language too subtle for our perception.

The District Court's criticism of the Commission in this respect deprives that body of the benefit of the usual presumptions that it acted lawfully and in good faith. It goes further than that, actually, for it ascribes to the Commission what would amount to deliberate dishonesty. It says in effect, that, although the Commission recites much evidence of public need and convenience and at no point says that the carriers' interests are considered paramount, it was all window dressing and the real purpose was to accommodate private interests.

Appellees seek to support the District Court's disparaging conclusion by confining their treatment to a small portion of the entire report, substituting their characterizations in most cases for the actual language contained in the report. A good example of this is found at the top of page 73 of their brief, wherein they quote from the report "If the proposed speed-up of service is practical for applicants, it is also feasible for other carriers competently managed." The next sentence which completes the paragraph, is this: "although added competition may force them to do it, none of the protestants proposes a like service." To quote the en-

tire paragraph with the exception of that short last sentence hardly indicates a disposition to be fair with this court.

They say that the Division failed to express any conclusion or make any determination as to what type of refrigerated service will best serve the public interest, or whether existing carriers are able to provide it. Yet, when we turn to page 29 of the record, we find the following:

> "Certain of the shippers prefer mechanical refrigeration because it can be controlled and is more satisfactory; some few complain that the equipment of certain protestants is not properly refrigerated; and at least one shipper has had to abandon attempts to make small shipments requiring refrigeration. Certain commodities cannot be exposed to dry ice. For example, lettuce, if exposed to dry ice, takes on a musty odor after it has been out of refrigeration for some time; flowers cannot be shipped with dry ice as it pulls too much moisture from them; and fresh meats cannot be handled with dry ice. On the other hand, even with mechanical refrigeration, fish would still have to be packed with wet ice."

At page 30 of the record we see the finding that, although Consolidated has been building mechanically refrigerated equipment at the rate of 4 or 5 a month, it has not been able to meet the demands of the public.

> "So far as this record shows, the two applicants herein are the only ones providing mechanical refrigeration, except for Pierce, which has one unit so equipped." * * *

"As stated, Colletti was planning to equip one unit with mechanical refrigeration in accordance with the suggestions of some of his customers, and Cascade also was planning to offer service with six units with mechanical refrigeration. L.A.S. does not desire to use mechanical refrigeration because the weight of the refrigerating unit (approximately 1,500 pounds) would be a 'dead loss on the northbound movement' and, even as to the southbound movement, is substantially heavier than dry ice. Another protestant, however, admits that mechanical refrigeration is a more full and complete method of refrigeration than either wet or dry ice."

It is not fair to the Commission or to the Court to pick up an isolated sentence or a fragment of a paragraph and attempt therewith to characterize the entire decision. This idea has never been better expressed than by Mr. Chief Justice Taney in *The License Cases*, 5 Howard (46 U. S.) 504, 573:

"* * * I think these controversies often arise from looking at detached passages in the opinions, where general expressions are sometimes used, which, taken by themselves, are susceptible of a construction that the court never intended should be given them, and which in some instances would render different portions of the opinion inconsistent with each other. It is only by looking to the case under consideration at the time, and taking the whole opinion together, in all its bearings, that we can correctly understand the judgment of the court."

The following are similar statements by this Court:

"The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it or passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted and what the decree was really designed to accomplish." Mr. Justice Day in *City of Vicksburg v. Henson*, 231 U. S. 259, 273, 34 S. Ct. 95, 100, 58 L. Ed. 209.

"The effect of a decree as an adjudication conclusive upon the parties, is not to be determined by isolated passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted, and which it was intended to decide." Mr. Justice Sanford in *Oklahoma v. Texas*, 272 U. S. 21, 42-43, 47 S. Ct. 9, 71 L. Ed. 145.

REPLY TO APPELLEES' ARGUMENT IV

Appellees next devote themselves to arguing that the Commission abused its discretion in denying their request to reopen the records for further hearing. The opening brief of the United States and the Interstate Commerce Commission treats this point at pages 56 to 60 inclusive and we have very little to add.

In *Baltimore & Ohio R. Co. vs. U. S.*, 298 U. S. 349, Mr. Justice Brandeis in a concurring opinion (pages 388 and 389) said of the Atchison case, to which appellees cling:

"The Atchison case rests upon its exceptional facts.

> It is apparently the only instance in which the court has interfered with the exercise of the Commission's discretion in granting, or refusing, to reopen a case."

In *I. C. C. et. al. v. Jersey City et. al.*, 322 U. S. 503, 515, this court said that the Atchison case is the only one in the history of administrative law where the court has interfered with the Commission's discretion in that respect.

Another case which is applicable here is *U. S. vs. Northern Pacific Ry. Co.*, 288 U. S. 490.

> "Appellees' petition charged that the Commission * * * abused its discretion in refusing to reopen the case and to receive proof of changes in economic conditions arising after the closing of the evidence." * * *
>
> "Though the order substantially reduced the carriers' revenue, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition. *They sat silent and took the chance of a favorable decision on the record as made.* They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order." (Our emphasis.)

In these cases too the appellees sat silent, taking their chances on a decision favorable to them. The records were made in the summer and fall of 1940. They did not ask

for a further hearing until after Division 5 had reversed the trial examiner—April 6, 1943 (R. 2489).

A proposal to show that the facts found by the Division were untrue as of the date of its order is not a sufficient reason for granting a rehearing. It would have to be shown further that the facts are so changed that they would justify a different result. These two records were made in normal times. Had there since occurred a depression (which was the situation in the Atchison case) there conceivably might be good grounds for further hearing. But in this case the exact opposite is true.

An analysis of the representation made by appellees at pages 78 to 81 of their brief (unsupported by any record reference and partially off record) shows that they have practically admitted themselves out of court on this point. They say that both applicants did establish a through service "identical with that proposed herein insofar as through operation of equipment is concerned." And that they, (appellees) in competition with the two single line services which they professed to fear, improved their service and added to their equipment.

At pages 81 and 82 they quote from the exceptions which O.N.C. filed on appeal from the unfavorable examiners' report to show that O.N.C. then wanted a further hearing. However, when they come to the reasons given by O.N.C. they offer three asterisks for the court's study. The court

will note by reference to 2484 of the record that the No. 1 reason given was "large increase in volume of traffic."

At pages 84 to 87 of their brief appellees attempt to support the argument that a further hearing should have been granted with representation that "the Commission found on later records that public convenience and necessity does not require added service." This is nothing short of incredible. That is the same representation that they made in their petition to the Commission for review and re-consideration (R. 2486 and 2519) and we exposed it as utterly false in our reply to that petition (R. 2520-2558). Then the very same allegations were pleaded and argued in the District Court and again we exposed them as utterly false (R. 150) (incidentally the court below did not sustain those allegations, either in its opinions, findings or conclusions, and they are put before this court in support of a different theory).

In our reply to these appellees' petition to the Commission, we exposed the falsity of the claim that the Reymers and Mitchell acquisition cases were decided on later records as follows: (R. 2543)

> "2. Protestants represent (p. 8) that the Reymers and Mitchell acquisition cases are later records.
>
> This is false. The Reymers and Mitchell purchase cases are not later records. The Division 4 record in Reymers purchase and Mitchell purchase was on hearings held October 21, 22, and 23, 1940. Record of

present case was of hearings held July 8, 9, 10, 22, 23, August 8, 9, 10, October 15, 16, 17, 18, 19, 31, 1940."

Division 4 did not adjudicate the question of convenience and necessity in either of those cases. Actually it expressly reserved that question for decisions in Consolidated's extension case as is evidenced by the last sentence on page 2589 of the record: *"nothing herein contained is to be construed as prejudicing action on applicants pending section 207 applications."* (Our emphasis.)

The same is true with respect to the O.N.C.-Control-Oregon Express case which appellees hold out as evidence that Division 4 later made a finding on the matter of convenience and necessity which is inconsistent with the Commission's determination in these extension cases. This is shown clearly by the following language which appears at page 2522 of the record.

> "We believe it necessary also to take cognizance of the circumstances discussed in our report in that case (Consolidated - Purchase - Reymer)* and to recognize the pendency of applications under Section 207 filed by both Fast Freight and Consolidated. Extensive proceedings have been held in those cases. *We believe the issues present here are so related that they should not be decided affirmatively in advance of determination of those proceedings."* (Italics supplied.) (R. 2522.)

As a matter of fact, when these appellees were arguing against Mitchell's petition for reconsideration they acknowl-

edged that Division 4 did not adjudicate the issue which was before Division 5. Their language is quoted at page 2522 of the record as follows:

> "Nothing could be clearer than that the majority report of Divison 4 deliberately refrained from forming or expressing any opinion with respect to these BMC-8 applications of Consolidated Freightways and O.N.C. Fast Freight. * * *."

The Division 5 decision which appellees say amounted to a later adjudication that convenience and necessity for an additional service did not exist, appears in the record at pages 2614 to 2618. The case is captioned "Oregon Express-Extension-alternate routes."

The applicant, Oregon Express, had authority to operate between Portland and San Francisco via Highway 99 to Grants Pass and thence through Crescent City and over Highway 101 along the Pacific shore line to San Francisco. It was seeking authority to conduct the same operations over the Valley Route through Klamath Falls and Medford. No shippers or other public witnesses supported the application. It rested entirely upon the theory that the use of the shorter inland route would contribute to safety, expediency, and economy (R. 2615). The Division worded its conclusion as follows:

> "It is clear that the proposed 'alternate' routes herein requested are more than that. Applicant by its own admission does not now have a practical route

between Portland and either San Francisco or Los Angeles. It cannot effectively compete over its present route with existing carriers using the proposed routes. What it actually proposes is a new service between points already adequately served. On the present record there can be no finding that there is any inadequacy of transportation facilities over the proposed routes. New services such as proposed only can be authorized upon a substantial showing of public convenience and necessity. Applicant has failed to make such a showing and the application should be denied." (R. 2617.)

Without a word of evidence bearing upon a public need for the new and different service proposed and without a shred of evidence tending to show the existing services over the new route inadequate, or deficient in any respect, of course the Commission could not make a finding of convenience and necessity. If an adverse finding under such circumstances acted to foreclose a finding of convenience and necessity based upon a prior record containing good evidence, then, by the simple device of having some operator put on a case sufficiently weak to assure an adverse finding, it would be possible to block any application.

REPLY TO APPELLEES' ARGUMENT V

In our opening brief, pages 55 to 57 and in the brief of the United States and the Interstate Commerce Commission, pages 32 to 35, the evidence and the sufficiency of the findings with respect to Consolidated's ability to operate

the proposed extension is fully discussed. That there was substantial evidence on both sides of the question is beyond controversy. The Commission's decision upon the facts therefore should have been binding upon the District Court.

Appellees have ignored entirely our opening brief on this point in which we pointed out that they failed to plead this issue before the Commission; and that they again failed to plead it or argue it before the District Court. It is another theory which came to light for the first time in the lower court's opinion.

In our opening brief on this point we also pointed out that, without any way of knowing whether the question of Consolidated's ability was before Division 5 on exceptions, it was error for the District Court to find that the Division's discussion of the point was inadequate. We urged that appellees promised to submit the entire record but failed to introduce the examiner's report in the Consolidated case and Consolidated's exceptions thereto. Appellees have indicated their belief that the examiner's report is a material part of the record before the Commission by quoting from it at pages 5 and 6 of their answering brief. If there was any occasion for Division 5 to discuss Consolidated's fitness and ability, it would seem that—while they were outside of the record—they might have brought that information back with them.

The preponderance of the argument offered by appel-

lees under this heading seems to be intended to convince this court that the Commission, in weighing the voluminous evidence with respect to Consolidated's ability, arrived at the wrong decision. Because the question is so clearly in the fact-finding field and because it is so well settled that this court will not substitute its judgment for that of the Commission on such questions we are dismissing appellees' presentation of their version without meeting the representations there made. By this, we do not mean to admit that any of the conclusions drawn by them under this heading are correct.

Consolidated needed no additional vehicles to give the service which was authorized by the certificate. Appellees represent that 5 added units costing $9,000 each would be necessary. The difference in our figures is accounted for by the fact that Consolidated's application to operate between Marshfield and San Francisco via U. S. Highway No. 101 was denied (R. 38).

REPLY TO APPELLEES' ARGUMENT VI

Our opening brief herein, page 59, shows that Consolidated's motion for intervention was filed 9 days before the answer of United States and 13 days before trial (R. 98, 102). Appellees do not suggest why, if Consolidated was ready to prove its case of laches, a lengthy postponement of the trial would have been necessary. As we stated to

the court (R. 102), we filed our intervention as soon as the case was set down for trial and before the primary defendant, The United States, had filed its answer. The case was tried before the Government's time to answer had expired. (R. 102.)

REPLY TO APPELLEES' ARGUMENT VII

In their argument that the lower court's conclusion that they were denied a fair hearing conforms to the allegations of their complaint appellees are too vague for us to follow. The District Court's ground for the conclusion was very clearly based upon the idea that appellees, when before the Commission, had no idea that both applications might be granted and perhaps would have prepared differently had such a possibility been realized. We say again that no such theory had ever been urged by appellees and we have demonstrated by quotations from the record that they always foresaw and even assumed that both applications might be granted.

Apparently appellees, in their argument on pages 97-8 sidestep the issue completely and swing over to a further discussion upon the denial of their petition for rehearing. We have already dealt with that point.

CONCLUSION

Appellees' conclusion at pages 99 and 100 of their

brief says that the "basic issue" before the District Court and here is whether the Commission "erroneously and improperly considered in, each proceeding embraced in its report and order, evidence not offered or received in said proceeding and not properly a part of the record therein."

That, as we have shown, was the issue to which we were confined in argument below. Appellees have not pointed out a single sample of such dishonesty on the part of the Commission. We apparently satisfied the District Court on the point for, in its opinion it clearly found that it was not necessarily so. In *I. C. C. et al v. Jersey City et al.* (cited supra) this court said (pages 512-13):

> "Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."

It cannot be presumed without evidence that the Commission did deliberately reach into O.N.C.'s case to support

Consolidated's application or vice versa. It must be presumed, at least, that the Commission is honest.

Respectfully submitted,
on behalf of
Oregon-Nevada-California Fast Freight, Inc.
and
Consolidated Freightways, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within Reply to Appellees' Answering Brief upon each of counsel for appellees herein as follows:

By mailing a copy, first class mail, registered, return receipt requested to the office of Wm. P. Ellis, Attorney, 212 Masonic Building, Salem, Oregon, counsel for appellees, Pierce Auto Freight Lines, Inc., and Angelo Colletti, doing business as Colletti Fast Freight; to the office of Alfred A. Hampson, Attorney, 800 Pacific Building, Portland, Oregon, counsel for appellees Pacific Southwest Railroad Association and Pacific Motor Trucking Company; and to Henry T. Ivers, Attorney, Hoge Building, Seattle, Washington, counsel for appellee Los Angeles-Seattle Motor Express.

DONALD A. SCHAFER.

Dated at Portland, Oregon,
January 23, 1946.